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No. 90-1836 (2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITIZENS ACTION COALITION OF INDIANA, INC.,
CITY OF TERRE HAUTE, INDIANA,
SAVE THE VALLEY, INC.,
Petitioners,

v.

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
OFFICE OF UTILITY CONSUMER COUNSELOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Indiana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

CHERYL M. FOLEY
DUEJEAN C. GARRETT
PSI ENERGY, INC.
1000 East Main Street
Plainfield, Indiana 46168
(317) 838-2336

VIRGIL L. BEELER *
FRED E. SCHLEGEL
JOHN R. SCHAIBLEY III
MARK A. VOIGTMANN
BAKER & DANIELS
300 North Meridian Street
Suite 2700
Indianapolis, Indiana 46204
(317) 237-0300

Counsel for Respondent Public Service Company of Indiana, Inc.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Should this Court grant certiorari to consider whether to overturn a state supreme court decision denying discretionary review, based solely on the fact that the decision was inadvertently and harmlessly disclosed by one of the state supreme court justices to a former state supreme court justice prior to the ministerial entry of the order, where the court itself later reconsidered its decision in light of the disclosure and unanimously let the denial of discretionary review stand?

RULE 29.1 STATEMENT

Public Service Company of Indiana, Inc. (now PSI Energy, Inc.), is a wholly-owned subsidiary of PSI Resources, Inc., a publicly traded company. PSI Energy, Inc., does not have any non-wholly-owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Public Service Company of Indiana, Inc. ("PSI"),[1] submits this brief in opposition to the Petition for a Writ of Certiorari filed by Petitioners, Citizens Action Coalition of Indiana, Inc., *et al.* (the "CAC"). The CAC seeks review in this Court of a unanimous decision by the Indiana Supreme Court (Pet. App. 1a) denying a petition seeking the retroactive recusal of Justice Richard M. Givan, and vacation and reconsideration of the court's previous order denying transfer (*i.e.*, discretionary review) of a decision of the Indiana Court of Appeals. For the reasons explained below, PSI urges the Court to deny the Petition.

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[1] Now PSI Energy, Inc.

STATEMENT OF THE CASE [2]

This case, which ostensibly presents a question of judicial disqualification involving a justice of the Indiana Supreme Court, arises from a state appellate challenge that the CAC mounted in an attempt to overturn an order of the Public Service Commission of Indiana [3] granting PSI a rate increase in 1986. The increase, in the amount of approximately $107 million annually, and its terms, were approved by the commission and reflected a resolution of the case agreed upon by both PSI and the Indiana governmental agency that acts on behalf of consumers, the Office of the Utility Consumer Counselor.[4]

The CAC appealed the commission order and the Indiana Court of Appeals affirmed. Pet. App. 5a. The CAC then sought transfer to the Indiana Supreme Court,[5]

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[2] The CAC's Statement of the Case contains numerous mischaracterizations of fact and arguments cloaked as fact. Accordingly, PSI has undertaken here to provide the Court with an accurate Statement of the Case. One inaccuracy deserves special mention. The CAC has cited a statement from a previous PSI brief before the Indiana Supreme Court for the apparent proposition that PSI does not challenge the CAC's account of events. Pet., p. 3 n.2. This statement was taken out of context. PSI's statement to the Indiana Supreme Court that "[t]here are no identified, disputed issues of fact before the Court" was immediately followed by the statement that "[t]he Court knows when it voted and determined the outcome in this case." In other words, because the case below concerned the internal processes of the Indiana Supreme Court, PSI was merely pointing out that the justices themselves knew the facts.

[3] Now Indiana Utility Regulatory Commission.

[4] The CAC has also mischaracterized the merits of the proceedings below. Since the merits are not at issue here, PSI has, in the interest of brevity, dispensed with making specific corrections of these errors.

[5] The Indiana procedure for "transfer" to the Indiana Supreme Court is similar in practice and purpose to this Court's certiorari practice. It provides for discretionary review of the decisions of the Indiana Court of Appeals, and its purpose is to permit the Indiana Supreme Court, as final arbiter of Indiana law, to establish

but the high court denied its petition. Pet. App. 3a. The CAC then challenged the denial of transfer on judicial disqualification and due process grounds. The focus of this challenge was a luncheon remark made by a state supreme court justice who had participated in the decision to deny transfer, Justice Richard M. Givan. It is this luncheon remark and its asserted constitutional consequences which form the sole basis of the present Petition.

The salient events are these. Oral argument on the petition seeking transfer to the Indiana Supreme Court was held on March 6, 1991. Immediately following the argument, the four justices participating in the case voted. The vote was a 2-2 tie on the question of transfer, thus resulting in an order denying transfer by operation of Ind. Appellate Rule 11(B)(5).[6] The order, according to one newspaper article relied upon by the CAC, "was written and signed the next day." Pet. App. 34a. For reasons that are unclear, the order of denial was not immediately released to the Indiana Supreme Court clerk. One newspaper reported that there was "some confusion" surrounding the vote. Pet. App. 25a. Another reported that "the order was held up when some justices reconsidered their votes." Pet. App. 28a.

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precedent and maintain its consistency. Common grounds for granting transfer petitions are that a decision of the Indiana Court of Appeals (which sits in panels) contravenes Indiana Supreme Court precedent, conflicts with another state court of appeals decision, or erroneously decides a new question of law. The Indiana Supreme Court may or may not hear oral argument on a transfer petition. A denial of transfer has no legal effect other than to terminate the litigation in the Indiana Supreme Court. It is not precedent and simply leaves standing the decision of the state court of appeals. *See generally* Indiana Continuing Legal Education Forum, Appellate Practice, *Petitions to Transfer to the Supreme Court of Indiana* 1-25 (1991); Smith & DeBonis, *Appellate Handbook for Indiana Lawyers* § 20.1 *et seq.* (1987).

[6] Ind. Appellate Rule 11(B)(5) provides in pertinent part:

> In all cases where the Supreme Court is evenly divided . . . upon the question of accepting or denying transfer . . . transfer shall be deemed denied . . . .

The delay, however, did not mean that the vote on March 6 (after oral argument) was preliminary. After an oral argument on a transfer petition, the vote is taken. There is no provision by court rule or practice for "preliminary" and "final" votes at this point.[7] Whatever the reason for the delay in the release of the order of denial in the present case, no justice changed his vote. From all that is known or can legitimately be inferred, the decision to deny the petition for transfer was made in the conference following oral argument on March 6.[8]

Five days after the vote, on March 11, one of the justices who had participated in the denial of transfer, Justice Givan, met for lunch with a longtime friend, Paul G. Jasper, himself a former justice of the Indiana Supreme Court. Some supreme court personnel also joined them. Pet. App. 28a. Former Justice Jasper was not a representative of PSI, either officially or unofficially. Although he had once been an officer of the company, that relationship had ended with his retirement in 1974. At 82 years old, the former justice continued to be active on a part-time basis in the bar and in a utility industry trade association, but his purpose in having lunch with Justice Givan and others appears to have been entirely social. The two had a long history. Among other things, Justice Givan had been a clerk in the court's law library under former Justice Jasper. Pet. App. 31a.

During that lunch, Justice Givan, under the impression that the decision had already been handed down,

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[7] Of course, the justices may have previously voted on the question of whether to hear oral argument.

[8] The entry of denial of transfer is routine and ministerial. The denial is either endorsed or entered directly on the petition papers by the chief justice, with the vote of each justice noted, followed by notice to the parties of the entry by the clerk, or a form entry is prepared, signed, filed with the clerk and sent to the parties, as occurred in this case. Indiana Continuing Legal Education Forum, Appellate Practice, *Petitions to Transfer to the Supreme Court of Indiana* 19-20 (1991). Both methods require no further deliberation by the court and are purely clerical functions.

mentioned that the transfer petition had been denied because of a 2-2 tie. Pet. App. 28a, 33a. Apparently as a result of this inadvertent disclosure, the denial of transfer became publicly known, and reporters began making inquiries to the court. On the following day, March 12, the court met to discuss the leak, and Justice Givan immediately reported his conversation with former Justice Jasper and apologized to the other justices for his mistake in assuming that the decision had already been announced. Pet. App. 32a, 34a. On March 13, the order denying transfer was formally entered and announced. Pet. App. 3a.

On April 2, 1991, based on the premature disclosure at the luncheon meeting, the CAC filed a petition in the Indiana Supreme Court seeking the retroactive recusal of Justice Givan, the vacation of the order denying transfer and reconsideration of its original transfer petition. After full briefing on these issues, the four Indiana Supreme Court justices who had participated in the original decision to deny transfer voted unanimously to deny the petition in all respects. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

I. THE CAC HAS MISCHARACTERIZED THE PROCEDURAL HISTORY OF THE CASE IN AN EFFORT TO BOLSTER UNSUPPORTED AND UNREASONABLE ALLEGATIONS OF JUDICIAL IMPROPRIETY.

Cases involving judicial disqualification are unique in that "there is not apt to be anything akin to the 'record' which supplies the factual basis for adjudication in most litigated matters." *Laird v. Tatum*, 409 U.S. 824, 825 n.1 (1972) (Rehnquist, J.). The CAC apparently views this inherent characteristic as a license to exaggerate, if not to fabricate.

The CAC would have this Court grant the Petition and set sail upon the waters of procedural due process on the

basis of the allegation that Justice Given "disclosed *ex parte* to a *representative* of Respondent [PSI] the outcome of the court's *preliminary* vote in conference regarding transfer." Pet., p. 3 (emphasis added). The quoted sentence, while concisely stating the CAC's central allegations, unfortunately suffers from any comparison to reality.

The March 11, 1991, lunch between Justice Givan and former Justice Jasper was *not* an *ex parte* meeting. No party in the case was present. Nor was it a meeting between a sitting justice and a *representative* of PSI. Former Justice Jasper's employment with PSI had ended 17 years earlier. He was not serving in any official or unofficial capacity on behalf of PSI. No one connected with PSI had helped to arrange or even knew about the lunch between the two justices. Yet the CAC makes free use of the terms *representative* and *ex parte*, seemingly in the hope of creating an atmosphere of underhandedness. This is doubly unfair, because it also obscures the human aspects of the relationship.

From the same sentence comes the CAC's baseless and unsupported characterization of the Indiana Supreme Court's vote to deny transfer on March 6 as *preliminary*.[9] "Preliminary vote" is a highly useful phrase for the CAC's purposes: it has the virtue of making a case of premature disclosure look very much like a case of *ex parte* consultation during a break in judicial deliberations. In a contrived effort to cast its argument in this favorable light, the CAC's Petition claims that "[t]he justices of the

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[9] The CAC's use of the term "preliminary vote" to describe the March 6 decision by the Indiana Supreme Court reflects an interesting variation from the terms the CAC used before the Indiana Supreme Court itself. There, the CAC merely labeled the vote as "non-final" (on the rationale that each participating justice "may reconsider" his vote) and emphasized that the matter was a "pending case" until the written order was entered. Presumably this was because the CAC recognized that the Indiana Supreme Court would have instantly rejected the "preliminary vote" characterization as inaccurate. A state high court obviously knows its own procedures.

Indiana Supreme Court met in conference on the afternoon of Tuesday, March 12, *to discuss the case again.*" [10] Pet., p. 5 (emphasis added). With this choice of words, the CAC clearly wants the implication to be drawn that this was the "final" vote on the denial of transfer. There is no evidence that any vote was taken on the transfer petition after the vote on March 6. As noted previously, a second or "final" vote is not only contrary to the court's practices, it contradicts sources of information available about the actual deliberations that were relied upon by the CAC itself.[11] Those sources of information indicate that the court's agenda for the March 12 meeting was to discuss the recent *leak* of the March 6 decision. Pet. App. 34a.

Perhaps the most outrageous of the CAC's broadbrushed attempts at innuendo is its not-so-veiled suggestion of insider trading. Pet., p. 6-7. The CAC directs attention to the fact that large blocks of PSI stock were sold on March 12, apparently proceeding on the assumption that this fact alone is suspect. The CAC de-emphasizes the fact that the block sales were in connection with an *ongoing* stock liquidation program then being conducted by an institutional investor, The Fund American Companies, Inc., and it ignores the fact that the size of the blocks

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[10] For obvious reasons, the CAC did not make any reference to this "fact" in its petition to the Indiana Supreme Court seeking the retroactive recusal of Justice Givan and reconsideration of the petition to transfer. The justices of the Indiana Supreme Court clearly know what was and was not discussed during their March 12 conference.

[11] The order denying transfer was written and signed on March 7, 1991. Pet App. 34a. The entry of the order with the clerk is routine and ministerial. Although newspaper accounts suggest the possibility of some confusion, or the possibility of one or more justices holding up the actual entry, thus resulting in Justice Givan's misunderstanding regarding the release date of the order denying transfer, no information exists about any further consideration of the transfer petition by the court and no further consideration would be expected.

traded was not unusual under the circumstances. The 1.3 million PSI shares traded on March 12 (primarily due to the Fund American liquidation) loses any possible significance when compared to the volumes *two weeks after* the announcement of the denial of transfer. On April 2 and 3, 2.5 and 3.1 million shares were traded, also as a result of the Fund American liquidation. The Wall Street Journal, Apr. 4, 1991, at p. C2. Viewed objectively, it hardly comes as a surprise to know that the price of PSI stock did not rise significantly either before or after the decision favorable to PSI was publicly announced, and no trading irregularities later came to light.

While it is bad enough that the Petition's discussion of large block trades of PSI stock on March 12 is not put into the context of what happened just two weeks later, it is particularly egregious when the CAC's inferences are strung together, as they necessarily must be, in an effort to fathom the possible *relevance* of such information. Can the Petition really be suggesting that Justice Givan was an accomplice in an insider trading scheme? Or is the CAC merely trying to plant the inference that most members of the general public would tend to believe that Justice Givan was involved in such a scheme?

Either way, the conclusions from these and other "facts" should be the same, although they are not quite the ones that the CAC seems to want. The conclusions are that allegations of insider trading are irrelevant. The Petition is rife with innuendo. And this case is simply *not* a proper case for review by the Supreme Court.

II. JUSTICE GIVAN'S LUNCHEON REMARK DOES NOT PRESENT AN ISSUE OF CONSTITUTIONAL DIMENSION.

A. The Situations Requiring Judicial Disqualification on Procedural Due Process Grounds Do Not Remotely Resemble This Case.

This Court has repeatedly undertaken to define the boundaries of procedural due process in widely differing contexts. Although, by necessity, the standards have been flexible and fact specific, it can nevertheless be said that within some contexts (the issue of judicial disqualification being one) the boundaries are not only known, they have been established with a reasonable degree of particularity. The problem with the Petition is that it wants to fit itself into a category where it does not belong. It wants to invoke the Due Process Clause when, at best, only a question of state law is presented. In pursuit of this goal, the CAC tries to blur the distinction between the line of *due process* judicial disqualification cases represented by *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), and the separate line of *statutory* judicial disqualification cases represented by *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The *Liljeberg* standard for judges, originating from a statute, is more rigorous; that is why the CAC wants to apply it. Its motivation for employing this strategy becomes even more obvious once the *applicable* precedent, the due process line of cases represented by *Lavoie*, is even cursorily examined.

The allegations of the Petition have no place alongside the due process violation that occurred in *Lavoie*. *Lavoie* concerned an Alabama supreme court justice who was in the process of personally suing insurance companies for alleged bad faith failures to pay claims *at the same time* that he supplied the deciding vote in an Alabama Supreme Court case which allowed punitive damages against an insurance company under similar facts. The

result was that the Alabama justice provided his own lawsuits with highly favorable precedent, thus making his interest "direct, personal, substantial and pecuniary." *Id.* at 824 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)).[12] While in *Lavoie* this Court vacated the Alabama high court decision on procedural due process grounds because of the judge's pecuniary interest, the opinion emphasized that if the Court had decided the disqualification issue purely on the non-pecuniary allegations that the judge was biased against insurance companies in general, the conduct would have fallen "well below" the level of a due process violation. *Id.* at 822. The Court went on to say that "[c]ertainly *only in the most extreme of cases* would disqualification on this basis be constitutionally required." *Id.* (emphasis added).

Justice Givan's inadvertent disclosure of the denial of transfer decision of the Indiana Supreme Court is, by no stretch of the law or facts, "the most extreme of cases." Whatever else the CAC may allege or imply, it cannot suggest that the disclosure in any way prejudiced the Indiana Supreme Court's deliberations. Obviously prejudice could not result when the decision occurred before the disclosure and the decision was not changed after the disclosure.

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[12] Cases involving a judge's pecuniary interest form the cornerstone of the Court's due process precedent in this area. In *Ward, supra*, a mayor responsible for city finances also acted as the local judge. A principal source of city revenue was judicially-assessed fines. This was held to be a violation of due process. *See also Tumey v. Ohio*, 273 U.S. 510 (1927) (dependence of judge's salary on fines was due process violation); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (pecuniary interest of optometrists sitting on state optometry board prevented them from giving fair hearing to competitors accused of unprofessional conduct). Like all "standards" arising from due process, however, this one has its limits. *See Marshall v. Jerrico*, 446 U.S. 238 (1980) (institutional pecuniary gain by Labor Department from assessment of civil fines did not violate due process); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) (pecuniary connection to supreme court justice too attenuated to justify disqualification).

Likewise, the event under scrutiny here does not bear even a remote resemblance to the situations in which this Court has invoked due process to vacate lower court rulings on the basis of a non-pecuniary interest. It does not resemble the line of non-pecuniary cases concerned with the improper combination of the functions of accuser and judge. *See In re Murchison*, 349 U.S. 133 (1955) (judge serving as "one-man grand jury" who indicted party, then conducted trial, violated due process).[13] Nor does the subject matter of the Petition remotely resemble the non-pecuniary cases which have entailed heated personal disputes between judges and lawyers which simply got out of hand. *See Taylor v. Hayes*, 418 U.S. 488 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Offutt v. United States*, 348 U.S. 11 (1954); *cf. Ungar v. Sarafite*, 376 U.S. 575 (1964). In short, the allegations of the Petition, *even accepting its mischaracterizations as true*, do not present an issue of constitutional dimension.

Presented with this difficulty, the CAC has opted for the strategy of erroneously attempting to equate procedural due process with the much more exacting *statutory or judicial canon* standards governing judicial disqualification. In other words, the CAC wants the Court to adopt the "appearance of partiality" criterion of *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), as the standard for procedural due process. While such an equivalence would do wonders for the CAC's burden here, it suffers from the handicap of being in contravention of settled precedent. It is axiomatic that not every

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[13] Even here, that which constitutes a due process violation is strictly limited. *See Withrow v. Larkin*, 421 U.S. 35 (1975) (not a violation of due process for medical licensing board to combine investigatory and adjudicative functions); *Hortonville Joint School Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976) (not a violation of due process for school board to hold disciplinary hearings and fire teachers on strike, even though strike may be consequence of school board actions).

alleged violation of a state or federal judicial canon, or recusal statute, produces a violation of the Due Process Clause. One need look no further than the cases cited in the Petition to find this law. "The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification . . . ." *Lavoie*, 475 U.S. at 829. Most matters relating to judicial disqualification do not rise to a constitutional level. *Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702 (1948). "[S]ection 455 establishes a statutory disqualification standard more demanding than that required by the Due Process Clause." *United States v. Couch*, 896 F.2d 78, 81 (5th Cir. 1990).

B. Even Under the More Exacting Statutory Standards Governing Judicial Disqualification, an Appearance of Partiality Does Not Exist as a Matter of Law.

Another problem with the CAC's rush to equate procedural due process with statutory disqualification is that even if this sleight of hand is successful, the equivalence does not produce the conclusion that the CAC is urging.

The legal standard the CAC wants is for this Court to require the retroactive disqualification of state supreme court justices on constitutional grounds if a justice's impartiality "might reasonably be questioned." This is the language of both the Indiana canon and the federal recusal statute. Ind. Judicial Conduct Canon 3(C)(1); 28 U.S.C. § 455(a).

However, in its impassioned argument in favor of this engrafted rule of law, the Petition then makes the following statement: "[p]etitioners' diligent search of the case law nationally has yet to reveal *even a single prior instance* which has been reported of a justice disclosing *ex parte* the preliminary conference vote of a state supreme court prior to entry of an order or issuance of an opinion." Pet., p. 17 (emphasis in original). Not only will

PSI stipulate to the thoroughness of the CAC's research in this area, it will take it one step further. PSI's diligent search of the case law nationally has not revealed even a single prior instance of *any* judge, state or federal, being disqualified on the basis of facts remotely analogous to the facts here. The reason for this void is plain. It does not mean, as the CAC would have it, that leaks never happen.[14] It *does* mean that inadvertent disclosure and friendship, without more, simply do not trigger even the much more demanding scrutiny of state judicial canons and federal recusal statutes.[15]

Put another way, courts have quite rightly concluded that it is not every indiscretion that constitutes an appearance of partiality. As this Court noted in *Liljeberg, supra*, judicial recusal is required under section 455(a) only when "a reasonable person *knowing all the circumstances*" would question the judge's impartiality. *Id.* at 861 (emphasis added). Reasonable persons understand and tolerate simple mistakes. Thus, in *Little Rock School Dist. v. Pulaski County Special School Dist.*, 839 F.2d 1296 (8th Cir. 1988), *cert. denied*, 488 U.S. 869, a district judge's impromptu criticism of a litigant school district in a meeting with students before the issuance of a desegregation order was not seen as rising to the level of a section 455(a) violation. The Eighth Circuit observed:

> § 455(a) [does not] require recusal every time a judge commits a procedural error or departs from

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[14] This Court, like most, has experienced leaks on occasion. For instance, on June 15, 1986, a reporter disclosed that the Court would shortly overturn a key section of the Gramm-Rudman-Hollings budget balancing law. *See* The Washington Post, June 17, 1986 at p. A1.

[15] Inadvertent disclosure and friendship also do not trigger state bar disciplinary action. The Indiana disciplinary cases cited by the CAC are easily distinguishable on their facts. For instance, the principal case cited, *Matter of Lewis*, 535 N.E.2d 127 (Ind. 1989), involved a judge's persistent pattern of *ex parte* discussions of the merits of cases, as well as favor brokering.

> protocol in some way. If it did, it would be extremely difficult for any human being (a category that includes judges) to preside for the duration of a case as complex and protracted as this one.

Id. at 1302. *See also In re Federal Skywalk Cases*, 680 F.2d 1175, 1184 (8th Cir. 1982) (judge did not abuse his discretion in not recusing himself following an *ex parte* telephone communication with counsel); *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 966-67 (5th Cir. 1980), *cert. denied*, 449 U.S. 888 (judge's comments about upcoming civil trial while playing golf with counsel involved in related litigation did not raise questions of judge's partiality); *In re Wirebound Boxes Antitrust Litig.*, 724 F.Supp. 648, 651 (D. Minn. 1989) (recusal not required after judge inadvertently held *ex parte* meeting concerning proposed order); *Bradley v. Milliken*, 426 F.Supp. 929, 941 (E.D. Mich. 1977) (recusal not required when judge's *ex parte* discussions did not involve disputed issues or trial strategy). The Fifth Circuit has described the inference of partiality created by the friendship between a judge and one of the lawyers appearing before him, without more, as "so lacking in merit as to warrant no discussion." *Parrish v. Board of Comm'rs of Ala. State Bar*, 524 F.2d 98, 102 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). *See also In re Estate of Carlton*, 378 So.2d 1212, 1219 (Fla. 1980), *cert. denied*, 447 U.S. 922 (state supreme court justice was not required to recuse himself merely because of friendship with a lawyer whose law firm represents one of the parties).

The non-pecuniary disqualification decisions cited by the CAC stand in stark contrast to those involving mere communication or friendship. In *United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989), the judge made repeated statements on the record suggesting that his judgment was being influenced by his relationship to a witness. In *Deren v. Williams*, 521 So.2d 150 (Fla. App. 1988), the judge openly expressed sympathy with the plight of the

plaintiff. In both *State v. Barker*, 420 N.W.2d 695 (Neb. 1988) and *State v. Valencia*, 602 P.2d 807 (Ariz. 1979), judges received extrajudicial information from the family of a victim prior to the sentencing of a criminal defendant.[16]

Justice Givan's inadvertent and harmless disclosure of the Indiana Supreme Court's vote does not even approach the gravity of the state and federal disqualification cases cited by the Petition. This contrast is apparent even *after* making the CAC's unwarranted assumption that state judicial canons and the Due Process Clause impose exactly the same standard.

The inescapable conclusion is that there is only one truly appropriate classification of the subject matter of the Petition, despite its mischaracterizations to the contrary. This case does not belong among those discussing due process of law. It does not belong in the statutory disqualification cases. It *does* belong alongside all those other unreported (or unlitigated) situations that "[p]etitioners' diligent search of the case law nationally" was unable, for good reason, to identify as having risen to the level of a case.

C. In Any Event, Whatever Appearance Problem There May Have Been, It Was Erased When the Indiana Supreme Court Considered the Very Question of Judicial Disqualification and Unanimously Ruled That Its Previous Denial of Transfer Should Stand.

By the time that the CAC had raised the issue of Justice Givan's luncheon conversation, the case was over. The Indiana Supreme Court had already decided the ques-

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[16] In one case cited by the CAC, *Easley v. University of Mich. Bd. of Regents*, 853 F.2d 1351 (6th Cir. 1988), *aff'd after remand*, 906 F.2d 1143 (1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1414 (1991), a judge's active involvement in the affairs of one of the parties was rightfully questioned initially, but on remand even *this* relationship was found not to rise to an appearance of partiality.

tion of discretionary review. Nevertheless the court permitted the CAC, despite the absence of precedent or procedure for any further proceedings, to bring the matter of retroactive disqualification before it. Both the CAC and PSI were allowed to submit full briefs.

Justice Givan quite properly decided the issue of his own recusal. *Laird v. Tatum*, 409 U.S. 824 (1972); *In re Estate of Carlton*, 378 So.2d 1212 (Fla. 1980). Even so, the importance of Justice Givan's participation may be only of academic interest. The vote to deny the petition was unanimous, 4-0; the two Indiana Supreme Court justices who had originally favored granting review did not agree with the CAC's arguments for reopening the matter. Pet. App. 1a. Thus, all four of the justices who participated in the denial of transfer—the only individuals who knew firsthand the course of their deliberative process—ruled that recusal was inappropriate, and that the CAC's due process rights had not been violated.

III. THIS CASE PRESENTS NO IMPORTANT QUESTION WHICH NEEDS TO BE ADDRESSED BY THIS COURT.

There is no important question in this case requiring the Court's attention. There has not been a rash of leaks of the decisions of either state or federal appellate courts. So, at best, the Petition addresses an isolated miscue, not a problem of systemic proportions or a problem that direction from this Court would likely cure. Moreover, the area of the law that the CAC unsuccessfully attempts to invoke—the due process constraints on judicial disqualification decisions—has just recently been visited by this Court. No further development of this area by this Court would seem necessary at this time (particularly the type of development that the facts of this isolated case would produce). It would be far better to let the lower courts

apply the guidance provided in this Court's recent decisions in this area.[17]

* * *

Before closing, a few words should be said about the nature of the CAC's attack upon Justice Givan. If the CAC's allegations against Justice Givan were confined to the distinct questions of law presented here, with the protocol and dignity such discourse demands, it would be one thing. In such a case PSI would undoubtedly dispute the CAC's legal theories (as it has here), but as a foundational matter, PSI would not be challenging the CAC's right to assert those theories, and see them succeed or fail. Here, however, the CAC's conduct has made it clear that this is not just a legal attack, it is a *personal* attack against the reputation of a distinguished state supreme court jurist. This anti-judicial campaign, and its vindictiveness, are plainly not appropriate for Supreme Court involvement.

It has become increasingly clear that not only does the CAC dislike losing legal battles, it is quick to personalize its defeats. Thus, the CAC has not been satisfied with *merely* seeking the retroactive recusal of Justice Givan before this Court; the CAC has seen it necessary to concurrently and publicly lambaste Justice Givan, sarcastically "awarding" him its "Burned Out Light Bulb Award." The Indianapolis Star, June 23, 1991, at p. C2. The CAC's labeling of Justice Givan—a respected justice of the Indiana Supreme Court for more than two dec-

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[17] The interests of comity and federalism also counsel against reviewing another case in this area in such a short period of time. State supreme court justices—like members of this Court—take oaths to uphold the Constitution, and the CAC essentially is asking this Court to second-guess its state court counterparts in discharging their obligation to safeguard due process guarantees. As this Court observed in *Argersinger v. Hamlin*, 407 U.S. 25, 38 (1972), "[w]e do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement." This is not the proper case for such review, and not the proper time.

ades—its chief justice for most of those years—as a burned out light bulb shortly after it filed its certiorari petition in this Court is beyond the pale. He deserves better, as thousands of Indiana lawyers can attest. Mocking Justice Givan scarcely comports with the proper appearances that the CAC has so emphatically advocated.[18]

There is no dispute that Justice Givan misunderstood the release date of the denial of transfer order. But "[j]udges being human, 'slips' occur. Justice would not be advanced if a 'slip' could be the basis for a forced disqualification of a high court judge who feels that he can approach the case impartially." Nadelmann, *Disqualification of Constitutional Court Judges for Alleged Bias?* 52 Judicature 27, 31 (1968).

Although nothing may prevent the CAC from grasping at *legal* straws—and the few of those it has grasped are not "certworthy"—it would be wrong to give this *ad hominem* campaign against Justice Givan the attention and status of a Supreme Court case.

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[18] Justice Givan is only the latest target. When the CAC was arguing its case before the Indiana Court of Appeals, it was a member of the Public Service Commission of Indiana who was the target of its attacks, also on the basis of a luncheon meeting—this time with creditors of PSI. The court of appeals rejected the CAC's allegation of bias. Pet. App. 15a.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHERYL M. FOLEY
DUEJEAN C. GARRETT
PSI ENERGY, INC.
1000 East Main Street
Plainfield, Indiana 46168
(317) 838-2336

VIRGIL L. BEELER *
FRED E. SCHLEGEL
JOHN R. SCHAIBLEY III
MARK A. VOIGTMANN
BAKER & DANIELS
300 North Meridian Street
Suite 2700
Indianapolis, Indiana 46204
(317) 237-0300

Counsel for Respondent Public Service Company of Indiana, Inc.

* Counsel of Record